The Role of Law in Economic Development and Adjustment Process: The Case of Korea

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I. Introduction

Until the sudden financial crisis and the subsequent International Monetary Fund (IMF) bailout loan in late 1997, Korea's economy had been referred to as a good example of Asian economic miracles. Many economists studied the Korean economy to introduce a desirable model for other developing countries' economic development. In this regard, the role of law in Korean economic development drew considerable attention from academic and policy circles. A few years ago, the author, as a country team leader, participated in a collaborative research project entitled "The Role of Law and Legal Institutions in Asian Economic Development (1960–95)," sponsored by the Asian Development Bank.[1] A part of the author's collaborative work analyzed whether law and legal institutions had a positive impact on economic development in Korea.[2] The above project obviously considered the Asian "miracles," but not the recent Asian "crisis." Accordingly, the author's collaborative work did not analyze the role of law issue covering the period following the Korean financial crisis.

Since the outbreak of the financial crisis, Korea has undertaken a series of economic reforms, and its economy is now in the process of recovery. This article examines whether

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1. For the final comparative report, see KATHARINA PISTOR & PHILIP A. WELLONS, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960–1995 (1998).

2. For the Korean team report, see SEUNG WHA CHANG & KWANG SHIK SHIN, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT: THE CASE OF KOREA (HIID Development Discussion Paper no. 661, 1998).

and to what extent law has played a role not only in Korea's economic development process (1960–1996), but also in the subsequent economic adjustment process (1997–1999), including the reforms being made in conjunction with conditionalities of the IMF bailout package and the World Bank's structural adjustment loans (SAL). In addition, this article points out the current economic reform's inherent limits that, in the author's view, result from the failure in establishing the "rule of law" in the judicial/administrative/legislative system of Korea. Then, this article concludes with some policy suggestions for fundamental legal reforms to realize the "rule-oriented society" in Korea.

II. The Role of Law and Legal Institutions in Korea's Economic Development: 1960–1995[3]

A. The Role of Substantive Laws in Korea's Economic Development

In terms of substantive economic laws, it would appear that there has been a high degree of interaction between the law and economic development in Korea. In particular, the Korean government intentionally utilized legislation in achieving its goals of economic development. The question of whether the legislative activities had a positive impact on economic development seems to depend on the subject of the law and the particular time period of Korea's development process. In certain time periods, the law appeared to have a positive impact on economic development, while in others, the law produced mere side-effects.[4] Thus, notwithstanding the high level of interaction between the law and economic development, it is not easy to draw a general conclusion as to the direction and nature of the influence of the legislative activity on the economy. This section briefly describes interplays between legislative activity and economic development in Korea for the last several decades, preceding the recent financial crisis.

In the 1950s, immediately after the Korean War, Korea did not witness considerable economic growth.[5] Nor were there well-established legal and institutional arrangements necessary for the government to pursue an active development strategy. The systematic legal infrastructure had not been established. Of course, Korea had its Constitution[6] and individual laws, such as the basic intellectual property laws and labor laws[7] that were in existence in the 1950s, but these laws were not enforced and, thus, were virtually meaningless. The institutions necessary to enforce the laws were not formally in place at that time.[8] Under these circumstances, it was inconceivable to derive an industrial policy that would prepare for the future restructuring of industries. In that sense, the law was virtually irrelevant to the economy, and vice versa. Moreover, it is difficult to relate legal change to economic change during this period, either positively or negatively, as there was no signifi-

3. This part derives mainly from *id.*

4. *See id.* at 1–5, 11–33.

5. For the economic conditions of Korea in the 1950s, see, *e.g.*, *id.* at 47–49; Kwang Suk Kim & Michael Romer, Growth and Structural Transformation 35 (1979); Charles R. Frank et al., Foreign Trade Regimes and Economic Development: South Korea 36 (1975).

6. For the amendment history of Korea's Constitution, see Dae-Kyu Yoon, *Constitutional Amendment in Korea*, 16 Korean J. Comp. L. 1–13 (1988).

7. For a historical description of the Korean labor laws, see Amy M. Rauenhorst, *Industrial Relations in Korea: The Backdrop to the Current Drama*, 11 Comp. Labor L. J. 317, 324 (1990); Kathleen B. O'Neill, *Industrial Relations in Korea: Will Korea Become Another Japan?*, 12 Comp. Labor L. J. 360, 385 (1991).

8. *See* Chang, *supra* note 2, at 1.

cant and distinguishable movement for legal change. The ability to manage the economy and to run the industries and business firms was badly needed, and the government was considered the most appropriate means for meeting these demands. But the government failed to provide a legal apparatus to aggressively correct market failures.

The establishment of a new government following the military coup in 1960 was accompanied by a shift in policy, with the government placing top priority on achieving economic growth and establishing an active government's role in economic activity. The government's strong commitment to guide economic development, the nationalization of several industries, the control of all the financial and fiscal policy tools, and short- and long-term plans all helped the government to direct economic activities.[9] Following the inauguration of President Park in 1963, intense legislative activities took place together with the making of new and ambitious government-driven economic plans. In the early 1960s, basic substantive laws were enacted or rewritten in the form of amendments to old laws. For instance, the Civil Code—including the laws of contract, property, securities, tort, and domestic relations—was enacted in 1961. Until then, Korea had borrowed the Japanese Civil Code. A number of major economic laws were enacted or substantially amended to enable effective enforcement and to reflect the Korea-specific legal and economic environment. For instance, major labor laws were substantially amended between 1961 and 1963, and the law to induce foreign investment was first enacted in 1960.[10]

The laws enacted by the 1960s were instrumental in achieving economic success. In the early half of the 1960s, many substantive economic laws were enacted, which brought about fundamental policy changes geared largely to supporting the export-led growth strategy. These laws, notwithstanding their *state-allocative* and fairly *discretionary* nature,[11] were applied in a nondiscriminatory manner, without bias towards any specific group of industries or firms. Significant reforms in trade and exchange policy led to rapid growth,[12] which continued uninterrupted until the early 1970s, particularly in the area of labor-intensive exports. Many laws were enacted to institutionalize and implement industrial policies to achieve rapid growth of exports and industries. It may, therefore, be said that legal changes supported economic growth during the 1960s and beyond.

The 1970s witnessed a significant shift in policy, with the implementation of laws designed to promote specific industries, particularly Heavy and Chemical Industries (HCI).[13] This governmental policy decision related to the HCI drive was first implemented as legislative activity. The government enacted several laws to promote key export-targeted in-

9. *See* CHANG, *supra* note 2, at 49–51.

10. *See* Doo Kim Hwan, *Legal Aspects of Foreign Investment in Korea*, 15 HASTINGS INT'L & COMP. L. REV. 227, 229; Sang-Hyun Song, *The Legal Framework of the US-Korea Trade Relations under Korean Law* (1995), *in* SANG-HYUN SONG, KOREAN LAW IN THE GLOBAL ECONOMY 733 (1996).

11. The author borrows this terminology from the ADB research project. The authors of the comparative report distinguished two dimensions of the legal system, allocative and procedural. The allocative dimension determines whether the power to make decisions about the allocation of resources is vested in the state or is left to the market. The procedural dimension reflects whether decisions are primarily rule-based or discretionary. Each dimension is a continuum, but both are cross-cutting and combine in four ways. One may speak of a legal system as (a) market/rule-based, (b) market/discretionary, (c) state/rule-based, or (d) state/discretionary. *See* PISTOR, *supra* note 1, at 4–7.

12. For the import liberalization policy in the 1960s, see Kwang Suk Kim, *Trade and Industrialization Policies in Korea*, *in* TRADE POLICY AND INDUSTRIALIZATION IN TURBULENT TIMES 338 (G. K. Helleiner ed., 1994).

13. *See* CHANG, *supra* note 2, at 51–54.

dustries, thereby providing the cornerstone for a subsequent governmental push towards an export-oriented economic policy.[14] These laws were highly state-allocative and discretionary and often the subject of arbitrary implementation. In many cases, government officials could arbitrarily select specific industry sectors or firms to be given government-conferred advantages or privileges. Although these laws enabled the government to strongly pursue an export-oriented strategic economic policy, their political and bureaucratic nature produced several adverse side-effects in the Korean economy. For example, the concentration of investments in HCIs led the economy to neglect light industries, sacrificing their growth potential; some of the government-led investments in HCIs turned out to be inefficient, leading to the subsequent realignment of investments and rationalization measures in the 1980s; the industrial organization dominated by the chaebol was also consolidated due to the HCI drive. In addition, during the 1970s, the government suppressed any private activities that might hinder the export-oriented economic policy. For instance, the government controlled the labor movement,[15] which was made possible by the labor law.[16]

The 1980s witnessed a series of new laws and policies to strengthen the functions of the market mechanism and to cure the imperfections found in the government's management of the economy.[17] These include trade liberalization, competition law and policy,[18] and deregulation and privatization of public enterprises. Major laws relating to industrial policy promoting key industries were amended to lessen the degree of government intervention.[19] The labor laws were also amended to enhance the protection of workers' rights, which was mandated by the new Constitution of 1980. Thus, the legal restrictions on workers' rights and the labor movement were largely lifted, although the labor movement itself was politically suppressed.[20] It is possible to think of the new government policies adopted in the early 1980s as countervailing measures to mitigate the side-effects resulting from the previous export-oriented economic policy prevailing throughout the 1960s and 1970s. In this sense, the role of law in the Korean economy from the 1960s to the 1980s can be summarized as follows. In the 1960s, law led economic policy. This continued during the 1970s, when the law was strengthened to further support and implement the export-oriented economic policy. Meanwhile, the Korean economy encountered serious side-effects as a result of this export-oriented economic policy. Accordingly, the law again took the lead in the 1980s to cure this economic disease.

14. For the description of these laws, see CHANG, *supra* note 2, at 24–26.

15. *See* Jennifer L. Porges, *The Development of Korean Labor Law and the Impact of the American System*, 12 COMP. LAB. L. J. 335, 351 (1991).

16. In contrast to this, during the same period, other cases reflect the positive effects that legal change had on Korean economic growth, without expensive opportunity costs to labor groups or others. For instance, the 1973 amendment to the Foreign Capital Inducement Act significantly contributed to an increase in foreign capital as well as foreign direct investment under very favorable conditions. This enabled Korean firms to implement large-scale investment in key industries and consequently contributed to the economic growth of Korea. *See* Song, *supra* note 10, at 744–46.

17. *See* CHANG, *supra* note 2, at 54–55.

18. For the first time, the Korean competition law, the Monopoly Regulation and Fair Trade Act, was enacted in December 1980. For the Korean competition law and policy in general, see Seung Wha Chang, *Korea*, *in* WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESSES ch. 36 (James J. Garrett ed., 1995).

19. *See* CHANG, *supra* note 2, at 24–26.

20. *See* Porges, *supra* note 15, at 352.

By the 1990s, Korea achieved a certain degree of economic stabilization and, at this time, attempts were made to modernize the entire Korean economic system, in an effort to reach the level of advanced countries.[21] In the legal arena, it is possible to identify many legislative activities that were undertaken to upgrade the quality of the laws.[22] In terms of economic activity, the government further deregulated and liberalized the economy and opened domestic markets to foreign firms. As the economy grew more complicated, the once significant role of the government began to decline and a market mechanism began to replace the state. This gradual process of the market substituting for the state has taken place. Nevertheless, the substitution process was very slow and the bureaucratic nature of the executive branch did not substantially change. It is fair to say that the 1980s and the first half of the 1990s comprised a period during which the traditional predominance of the state over the market—represented by regulations, protections and supports—was actively interacting with new forces of the market, represented by trade liberalization, competition, deregulation, and privatization. In this connection, the nature of economic laws was still a mixture: *state/discretionary* in some respects and *market/rule-based* in other respects.

Since the mid-1980s, liberalization was on the agenda in trade talks with Korea's major trade partners, especially the United States. Their demand for further liberalization of imports and investment began to affect Korea's trade and investment policies and accelerated market opening. It is also significant that, during this period, Korea became exposed to pressure from abroad to initiate changes in its economic and legal regimes in order to conform to international agreements, such as the WTO Agreement. In addition, with the accession to the OECD in the summer of 1996, Korea took the initiative to change the major economic laws to bring them in line with those of the other OECD countries. For instance, intellectual property laws and the laws relating to industrial policy were further amended to conform to Korea's obligations under the WTO Agreement.[23] The law relating to foreign investment was not an exception to this process of legal change. In the late 1980s, all of the major labor laws were also significantly amended to enhance the level of protection of workers' rights, and the government began taking a fairly neutral position between labor and management.[24]

In late 1997, however, the Korean economy was abruptly hit in the middle of the economic adjustment process that was accompanied by transitional changes in the nature and substance of economic laws described above.

B. The Role of Legal Institutions in Korea's Economic Development

We are then faced with the question of whether it is possible to demonstrate a positive relationship between economic development and the increasing significance of the role of the legal and dispute settlement systems over the past few decades. Indeed, the modernization and development of legal institutions and dispute settlement systems went hand in

21. *See* Chang, *supra* note 2, at 55–56.

22. *See id.* at 11–33.

23. For the impact of multilateral trade negotiations on the Korean intellectual property laws, see Sang-Hyun Song & Seong Ki Kim, *The Impact of Multi-lateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 UCLA Pac. Basin L. J. 118, 118–39 (1994), *reprinted in* Sang-Hyun Song, Korean Law in the Global Economy 1034–49 (1996).

24. *See* Rauenhorst, *supra* note 7, at 334.

hand with economic development. Despite this parallel development, when compared with substantive economic laws, it is not certain that the modernization of legal institutions and the legal system, in any respect, had a direct impact on economic development. Notwithstanding its modernization for the last several decades, it appears that the current legal and dispute settlement system has yet to satisfy the social demand for resolving the increased legal disputes that accompanied economic development. Having said this, the next section reviews the evolution of Korea's dispute settlement systems from 1960 to 1996.

1. *Legal Institutions and Process*

The basic court system had already been established before 1960. In 1960, the Korean courts handled all kinds of legal disputes, including civil, commercial, criminal, and administrative cases. All courts were established within the framework of the judicial branch of the government, which was constitutionally independent from the executive and the legislative branches. The courts were structured in three levels: the Supreme Court, High Courts (mostly courts of appeal) and District Courts. As far as politically insensitive cases are concerned, the courts were regarded as fairly independent. Government expenditure on the judiciary at that time was very low, however.[25] Arbitration as a means of alternative dispute settlement was used only after the enactment of the Arbitration Act in 1966.[26]

Since 1960, many important changes have taken place with respect to legal institutions and process. Most noticeably, the 1987 Constitution established a Constitutional Court for judicial review. Because this institution was created against the background of further progress towards democratization, its caseload has increased strikingly, in terms of variety as well as in number, and the ratio of "constitutional checks" on legislation has also been relatively high.

Looking back on the history of the Judicial Branch, the original court structure has remained basically unchanged. A few special courts, such as a Family Court and an Administrative Court, were newly established. There has been a marginal increase in the number of lower courts, as shown in Table 1.

Table 1:
Number of Courts

Year	Supreme Court	High Court	District Court	Divisions of the District Court
1962	1	3	10 (1963)	N/A
1972	1	3	10	38
1974	1	3	11	n/a
1979	1	3	11	38
1981	1	4	13	40
1988	1	4	13	41
1989	1	5	14	n/a
1994	1	5	12 (since July)	44

Source: OFFICE OF JUDICIAL ADMINISTRATION, SUPREME COURT OF KOREA, HISTORY OF THE COURTS (1995).

25. *See* CHANG, *supra* note 2, at 5–6.
26. *See id.*

Commercial arbitration has played a more important role in recent years, but the number of cases resolved under this nonjudicial system is only a fraction of the number of cases brought before the court.[27]

2. *The Legal Profession*

a. Legal Education and Entry to the Bar

In 1960, Korea had a handful of colleges of law. In addition, graduation from a college of law did not guarantee the license to practice as a lawyer. Rather, it was necessary for applicants to pass the National Judicial Examination, which was administered by the government. It was not required that applicants for the examination be law school graduates —even those without a college education were allowed to apply for the examination. The difficulty of passing the exam, however, may be demonstrated by the fact that in 1960, only twenty-four out of 3,416 applicants passed it. This amounts to a passing rate of 0.7 percent.

Since 1960, although the number of law schools has gradually increased, the number of students who pass the National Judicial Exam has continued to be extremely low. One result of limiting the number of lawyers has been a chronic shortage of judges and prosecutors, to say nothing of lawyers.[28] As shown in Table 2, in 1981, the authorized number of candidates was increased to 300, followed by a substantial increase to 500 in 1996.

Since the Judicial Research and Training Institute (JRTI) was established in 1971 as a branch of the Supreme Court, it has provided training for those who passed the Judicial Examination. Thus, immediately following the completion of training at the JRTI, the graduates usually become judges, public prosecutors, or practicing lawyers, according to their individual desires and their performance on the bar examination and at the institute.

Since 1994, there has been substantial debate as to the need (or not) to reform the judicial system as well as legal education. These arguments have, thus far, only led to marginal changes such as modifications in the composition of subjects for the Judicial Examination and increases in the number of successful applicants, as shown in Table 2.

b. Judges

Recognition of the necessity for judicial reform is partly due to the lack of legal professionals, especially judges. The distribution ratio of judges to the population as of 1995 was approximately 1:42,000.[29] Table 3 represents the increase in the number of judges since 1960.

Such a low number of judges necessarily burdens individual judges with extremely heavy caseloads and low-quality bureaucratic legal services.[30] Table 4 indicates the average caseload per year of individual judges over the past twenty years.

27. For an overview of the rules and practices of Korean commercial arbitration, see Song Kun Liew, *Recent Developments in Commercial Arbitration in the Republic of Korea: The Revised Rules of the Commercial Arbitration Board*, 4 AM. REV. INT'L ARB. 37–60 (1993), *reprinted in* SANG-HYUN SONG, KOREAN LAW IN THE GLOBAL ECONOMY 479–98 (1996).

28. *See* DAE-KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 113 (1990).

29. *See* CHANG, *supra* note 2, at 38.

30. *See* Chang Soo Yang, *The Judiciary in Contemporary Society: Korea*, 25 CASE W. RES. J. INT'L L. 303, 304-05 (1993).

Table 2:
Judicial Examination Statistics

Year	Applicant	Successful Applicant	Rate of Success
1960	3,416	24	0.7%
...	...	...	...
1977	4,011	80	2.0%
1979	4,506	120	2.7%
1980	n/a	141	n/a
1981	6,173	289	21:1
1982	7,386	300	25:1
1983	8,450	300	28:1
1984	12,221	303	40:1
1985	12,449	298	42:1
1986	14,303	300	48:1
1990	15,041	298	50:1
1991	16,311	287	57:1
1992	17,131	288	59:1
1993	18,991	288	66:1
1994	19,736	290	68:1
1995	20,737	308	67:1
1996	22,771	502	45:1
1997	20,551	604	30:1

Source: DAE-KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 114–15 (1990); OFFICE OF JUDICIAL ADMINISTRATION, HISTORY OF THE COURTS (1995); and the Ministry of Government Affairs and Home Administration.

Table 3:
Number of Judges

	1960	1965	1970	1975	1980	1985	1990	1995
No.	291	372	413	517	562	794	1,028	1,212 (1,106)

Source: OFFICE OF JUDICIAL ADMINISTRATION, HISTORY OF THE COURTS (1995).
Note: The number in parentheses is that of active judges.

c. Lawyers

The usual career path to become a practicing lawyer was for JRTI graduates to become judges or prosecutors and serve in that capacity for several years, then to go to private practice following their retirement from public service. With the steady number of newly hatched lawyers each year, however, a significant number now choose their career as a lawyer without acquiring prior practical experience as a junior judge or prosecutor, as their predecessors had. In the late 1970s, a few law firms were established and have been prosperous since then. Since the early 1990s, smaller law firms joined the first runners, and the total number of law firms has continued to increase. Further, there has been a remarkable tendency in recent years for lawyers in private practice to be recruited as judges, although there are still few instances of this. There have been a number of cases where, on the other hand, judges have begun to participate in law firms after several years of public service.

Table 4:
Caseload of Individual Judges

Year	Supreme Court	High Court	District Court	Average
1978	440.1 (16)	145.7 (75)	498.8 (413)	444.4 (504)
1979	457.0 (15)	165.9 (74)	524.1 (413)	469.0 (502)
1980	640.0 (13)	187.9 (78)	614.8 (445)	553.3 (536)
1981	514.8 (12)	221.9 (84)	769.5 (442)	678.3 (538)
1982	484.5 (13)	213.3 (96)	774.4 (463)	673.6 (572)
1983	494.8 (13)	195.8 (101)	722.0 (500)	641.3 (614)
1984	466.0 (13)	171.8 (111)	881.8 (510)	715.8 (635)
1985	496.3 (12)	165.9 (118)	891.4 (583)	697.7 (713)
1986	462.1 (13)	164.3 (124)	842.5 (643)	681.0 (780)
1987	495.3 (13)	142.8 (138)	843.0 (655)	677.1 (806)
1988	487.7 (13)	128.6 (143)	699.0 (701)	600.6 (857)
1989	425.7 (13)	136.9 (148)	653.0 (748)	565.7 (909)
1990	639.9 (13)	157.9 (151)	653.5 (782)	574.2 (946)
1991	837.1 (13)	182.3 (151)	679.4 (802)	603.8 (966)
1992	953.1 (13)	154.6 (164)	678.3 (832)	596.7 (1,009)
1993	1,056.9 (13)	187.6 (163)	736.8 (835)	652.4 (1,011)
1994	965.5 (13)	161.0 (166)	748.8 (885)	625.1 (1,064)
1995	921.9 (13)	151.3 (172)	808.9 (921)	627.4 (1,106)

Source: OFFICE OF JUDICIAL ADMINISTRATION, HISTORY OF THE COURTS (1995, 1999).
Note: i. The caseload in the table is the average workload of a judge on litigation cases alone.
ii. The number in parentheses indicates the number of judges.

d. Judicial Independence

Judges are constitutionally assured independence from interference by any state institution, whether it be legislative, executive, or judicial. In the past, the Korean judiciary was criticized for not employing its full autonomous power as guaranteed by the Constitution, and being susceptible to political pressure from the executive branch.[31] These accusations have ceased to be valid, particularly in light of recent practice. The Court has, over the past few years, surprised the executive by handing down bold decisions from time to time as an assertion of judicial independence. The executive naturally took note. Personal accounts from current judges reveal that they do not feel constrained by pressure from the executive.

The method of appointment of Justices, including the Chief Justice, has changed with each constitutional amendment; on the whole, it has been a presidential prerogative. Again, although executive influence may have, in the past, played a part in matters of appointment, the reality of the last few years would suggest that it no longer has a direct impact on judicial decisions rendered in individual cases.

The tenure of lower court judges is a fixed period of ten years. Although consecutive terms may be served, reappointment by the Chief Justice, who has exclusive jurisdiction over these matters, is required. Again, there has been criticism that this opens the system to abuse. Critics have pointed to a number of cases in the past where a judge has been refused reappointment for political reasons or has been dismissed without being told the grounds for dismissal (although the inference has been that it was due to the fact that their

31. *See* YOON, *supra* note 28, at 136.

decisions had displeased the executive branch).[32] Nevertheless, it must be noted again that this is not the case today. Judges currently indicate that they do not feel any sense of insecurity of their position, but rather feel free from pressure either from the executive or the upper judiciary in terms of rendering individual judgments.

3. *Type of Legal System and Sources of Law*

The modern Korean legal system was based on the German and Japanese models by virtue of the initial imposition of Japanese colonial power at the turn of the twentieth century. Even after independence, this civil law system continued, and by the early 1960s, the major fundamental codes of Korea were all in existence. Like other East Asian countries, however, the Korean legal system in the 1960s was not free from Confucian influence. This was evident in the laws governing domestic relations and inheritance, in particular.

The basic structure of the Korean legal system has remained within the civil law tradition. Nonetheless, there has also been evidence of the impact of the laws of non-civil law countries. Even in the areas of private civil law, such as product liability, Korean laws and judicial decisions have started to adopt American legal theories or principles. The strong influence of common law can be found in legislative activities in the area of economic regulation. The U.S. Securities Acts of 1933 and 1934, for instance, directly influence the securities laws of Korea. Korea's recent entry to the OECD also has a significant impact on laws relating to, inter alia, the financial system, corporate governance, foreign investment, and labor policies. Several rules (binding or nonbinding) and economic policies adopted by the OECD are rooted in the common law soil. In this sense, the question of whether the Korean legal system is based on the civil-law or common-law structure is of little significance, at least regarding economic laws.

III. Korean Financial Crisis and Structural Adjustment Reforms: 1997–1999

A. The Economic Background of the Korean Financial Crisis

In July 1997, Thailand faced devaluation of its local currency, the baht, and this phenomenon spread to Indonesia in October 1997. This Asian financial crisis also adversely affected neighboring countries such as the Philippines, Malaysia and Hong Kong. Following the Indonesian crisis, Korea was the country most seriously hit by the financial crisis. This Korean crisis drew much more attention from the whole world because of its economic importance in Asia and its dramatic economic success for the last decades. The Korean won rapidly depreciated seventy percent in value between mid-October and mid-December 1997, which was followed by the loss of two-thirds of its stock market value between August and December.[33] After a few weeks of initial resistance, Korea was forced to seek financial bailout packages from international institutions on November 21, 1997. The total $57 billion packages were derived from the IMF ($21 billion), the World Bank ($10 billion), the Asian Development Bank ($4 billion), and twelve industrialized countries (approximately $22 billion).[34] When Korea sought financial assistance from the IMF and others, it entered into agreements on restructuring programs.

32. *See id.* at 140.

33. *See* John W. Head, *Lessons from the Asian Financial Crisis: The Role of the IMF and the United States*, 7 Kan. J. L. & Pub. Pol'y 70 (1998).

34. *See id.* at 73.

There are at least two divergent views on the causes for the Asian crisis and, in particular, the Korean crisis.[35] The first focuses on the liquidity shortage of the Asian countries. It points out "the vulnerability of the international financial market and the skittish behavior of international investors and creditors as a major triggering factor in the outbreak of the crisis."[36] Korea faced a sudden debt problem in mid-1997, since Korean business companies and financial institutions relied too much on short-term foreign debts that are beyond Korea's foreign exchange reserves. Since foreign investors were getting nervous about the Korean market and, more generally, about the Asian market, the Korean won naturally came under attack. This view emphasizes the balance-of-payment adjustments. According to Martin Feldstein, what Korea needed at that time was "coordinated action by creditor banks to restructure its short-term debts, lengthening their maturity and providing additional temporary credits to help meet the interest obligations."[37] The IMF could have helped Korea by providing a temporary bridge loan and then organizing the banks into a negotiating group.[38]

Others took a different view that focuses on "fundamental structural weakness" of Korea as a major cause of the crisis.[39] They argued that Korea needed restructuring of its relevant economic system. The IMF took this approach. The IMF organized the $57 billion bailout package for Korea so that Korean private companies and financial institutions could satisfy their foreign currency obligations. In return, the IMF effectively demanded fundamental structural reforms in the Korean economy. Korea accepted the IMF demand.[40]

B. Conditionality of the IMF Bailout Package

The regular process for using the IMF's general resources is the following. First, a member requests use of the IMF general resources. At this request, the IMF sends a mission to the requesting country for bilateral negotiations on the terms of the financial assistance. According to the result of the negotiations, the requesting country submits a Letter of Intent requesting Stand-by Arrangements. The Letter of Intent is a unilateral document prepared by the requesting country that does not carry any contractual obligations. In the Letter of Intent, the requesting government announces its policy understandings to resolve the current balance-of-payment problem. The Stand-by Arrangement usually stipulates the timetable for phased drawings and performance criteria for adjustment programs. It simply refers to the Letter of Intent for the details of the programs. Then, the Managing Director of the IMF Executive Board recommends consideration by the board. The Executive Board adopts Stand-by Arrangements as its decision.[41] This whole process is mandated by article

35. *See* Yunjong Wang, Restructuring and the Role of International Financial Institutions: A Korean View 10–12 (Korean Institute for International Economic Policy, Working Paper 99–06).

36. *Id.*

37. Martin Feldstein, *Refocusing the IMF*, Foreign Aff., Mar./Apr. 1998, at 20.

38. *See id.*

39. Wang, *supra* note 35, at 11. For a criticism of this view, see Mark Weisbrot, *Globalization for Whom?*, 31 Cornell Int'l L. J. 631, 653 (1998).

40. In Korea's Letter of Intent requesting IMF financial assistance, Korea accepted this view. *See* Letter of Intent of the Republic of Korea (Dec. 3, 1997) (last visited Mar. 28, 2000) <http://www.imf.org/external/np/loi/120397.htm> (stating that "[t]he government has put in place a comprehensive policy package to address decisively and promptly the structural weaknesses that are at the root cause of the present difficulties. . . .").

41. For the description of this process in more detail, see Erik Denters, Law and Policy of IMF Conditionality chs. 3 & 4 (1996).

V, section 3(a) of the Articles of Agreement of the International Monetary Fund (IMF Agreement). It provides:

> [t]he Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will *establish adequate safeguards* for the temporary use of the general resources of the Fund [emphasis added].[42]

This provision was designed to assure the repayment capability of the requesting member country. For this purpose, the IMF is required to assess the soundness of the recipient country's proposed adjustment programs that are expected to improve its balance of payments. Stand-by Arrangements that mirror the contents of the requesting party's Letter of Intent usually contain the so-called IMF "conditionality." The performance criteria included in the Stand-by Arrangements derive from the policy understandings and are the core elements of the conditionality. Any failure to meet these criteria will mean that financial assistance is cut off or suspended.[43]

The Executive Board adopted the IMF Guidelines on Conditionality on March 2, 1979. Article 9 of the Guidelines provides in relevant part:

> [t]he number and content of performance criteria may vary because of the diversity of problems and institutional arrangements of members. . . . Performance criteria will normally be confined to . . . *macroeconomic variables*. . . . Performance criteria may relate to *other variables only in exceptional cases* when they are essential for the effectiveness of the member's program because of their macroeconomic impact.[44]

A review of the Korean performance criteria included under the Stand-by Arrangement revealed that the IMF regarded the Korean situation as an "exceptional case."[45] In June 1999, the Korean government had submitted nine Letters of Intent since December 3, 1997.[46] The Korean performance criteria of course included macroeconomic variables such as credit limits, money growth rates, amount of foreign assets, balance of payment, and the foreign exchange guidelines.[47] The criteria, however, focus more comprehensively on the restructuring programs, targeting the structural reforms in the financial and corporate sectors.

C. Structural Reforms of the Korean Economy

From the beginning, the IMF and Korea agreed on four principal subjects for structural reforms: the financial sector, corporate sector, public sector, and labor market. In addition

42. Articles of Agreement of the International Monetary Fund, July 22, 1944, art. V, § 3(a), *available at* <http://www.imf.org/external/pubs/ft/aa/aa05.htm#3>.

43. *See* Denters, *supra* note 41, at 107–09.

44. *Id.* at 108 (emphasis added).

45. Republic of Korea IMF Stand-By Arrangement, Summary of the Economic Program (Dec. 5, 1997) (last visited Mar. 28, 2000) <http://www.imf.org/external/np/oth/korea.htm>.

46. *See* Wang, *supra* note 35, at 22.

47. *See id.* at 19.

to the $3 billion Economic Recovery Loans made on December 24, 1997, the World Bank provided Korea with $4 billion of the SAL in 1998.[48] This SAL is subject to strict conditionality that encompasses the above four sectors and beyond.[49]

The Korean financial reform efforts began by establishing a government agency charged with consolidated supervision of the financial sector—the Financial Supervisory Commission (FSC). The Korean government gave priority to the resolution of troubled financial institutions and, in the long run, is trying to improve the regulatory and institutional framework to support the financial system. The main features of the financial reform program include the following: resolution of weak financial institutions; adoption and application of sound principles and processes for the use of public resources in financial sector restructuring and recapitalization; enhancement of the independence and institutional capacity of the FSC; strengthening of prudential regulations; developing the capital market through various means; and strengthening of securities market prudential rules and self-regulated organizations.[50]

The corporate sector reform followed the financial restructuring. The corporate restructuring is aimed at development of market-oriented principles in this sector. Most of all, it focuses on corporate governance. This program includes the following main elements: effective monitoring of corporate performance to promote rights of shareholders—particularly minority shareholders—and creditors; strengthening the role of the market for corporate control; realization of financial transparency and accountability through adopting international accounting and auditing standards and disclosure rules; prohibiting the affiliates' payment guarantees; and capital structure improvements, especially targeting chaebols.[51]

The Korean government also initiated a reform of state-owned corporations (SOE). The core objective of this program is to privatize and restructure SOEs and downsize government organizations.[52] In particular, the major infrastructure sectors are to allow private participation. The labor market reform was aimed at facilitating economic restructuring to mitigate the social costs of the financial crisis. The major program is to enhance labor market flexibility by legalizing layoffs and strengthening the prohibition of illegal labor practices.

IV. The Role of Law in the Korean Economic Reforms: 1997–1999

A. Again: Law as an Instrument for Economic Reforms

Part II demonstrated that the Korean government intentionally utilized legislation to achieve its goal of economic development. In some subjects of economic laws and under particular time periods for the development process, the law had a positive impact on eco-

48. *See* Wang, *supra* note 35, at 16–17. The first round of the SAL of $2 billion was provided on Mar. 27, 1998, and then the second $2 billion SAL was approved on Sept. 26, 1998. *See id.*

49. *See* Letter of Korea Minister of Finance and Economy to President of the World Bank: Proposed Second Structural Adjustment Loan (Sept. 24, 1998), *available from* the Korean Ministry of Finance and Economy [hereinafter *Korea's SAL Proposals*].

50. *See id.* para. 5.

51. *See id.* paras. 6 & 7.

52. *See* Wang, *supra* note 35, at 30–31.

nomic development, while in others, the law produced side effects only. In the process of economic reforms made since the financial crisis, the Korean government again employed massive legislative activities. There is a major difference between the past and the present, however, in that the former legislative activities were basically self-initiated, whereas the latter were implemented to meet the conditionality of the financial assistance from the IMF and the World Bank.

For financial sector reforms, Korea's National Assembly enacted the Financial Supervisory Body Act to legally authorize the FSC to perform its supervisory role in the financial reform process. For the first year after its birth, the FSC issued more than forty regulations to exercise its authority under the law. The Act Concerning the Structural Improvement of the Financial Industry and the General Banking Act were amended to facilitate structural reforms of the unhealthy financial industry and adopt international practices in prudential regulations, as expressed in the Basle Committee's twenty-five Core Principles for Effective Banking Supervision. The National Assembly enacted a law to enable the Korean Asset Management Company (KAMCO) to adopt principles for the disposition of troubled assets.[53] For a capital market reform, the National Assembly made changes in the Securities and Exchange Law.

The Commercial Code was substantially amended to facilitate corporate sector reforms. Major elements of the amendment include the following: improve minority shareholders' rights, including lowering the thresholds for derivative suits; require listed companies to have a minimum number of outside directors on their boards; and impose on directors and "shadow" directors the same liability to their companies. The National Assembly also amended the Certified Public Accountant Law and External Audit Law to rationalize the role of various government agencies in supervising the accounting and auditing profession and to adopt international accounting and auditing standards and practices. The FSC's regulations also support reform in this regard. The Foreign Investment Promotion Act abolished old restrictions on foreign direct investment through mergers and acquisitions. The Foreign Exchange Management Act was replaced by the Foreign Exchange Transactions Act, which is aimed at further liberalization of foreign exchange transactions.

For SOE restructuring and governance reforms, the National Assembly amended the Act Concerning Management Structure Improvement and Privatization of SOEs. At the early stage of reform efforts, labor laws were amended to enhance labor market flexibility, e.g., legalizing layoffs to remove undue labor market impediments to efficient corporate restructuring. According to specific conditions under the World Bank's SAL, Korea amended the Monopoly Regulation and Fair Trade Act (MRFTA) to make significant changes in substantive provisions of the law in addition to strengthening the operational capacity of the Korean Fair Trade Commission (KFTC). It should be noted that the legislative activities summarized above are only a fraction of the legal measures taken to implement economic reforms. During 1998 and 1999, numerous laws were enacted or amended for that purpose.

Interestingly, most of these legislative bills were drafted by nonlawyer government officials of the executive branch. The members of the National Assembly made only marginal modifications in the legislative bills or simply passed them. With few exceptions, lawyers

53. The title of this law is the Act Regarding Efficient Disposition of Troubled Assets of Financial Institutions and Establishment of KAMCO.

—whether in private or public sectors—did not actively participate in this legislative process. Most of them were indifferent to this important substantive legal reform process.

B. An Early Assessment: Inherent Limits of Reforms

As of late 1999, statistical data on Korea's economy indicate positive signs that Korea's economic recovery process is heading in the right direction.[54] Korea's GDP grew by five percent in 1997, and then after the financial crisis, contracted by 5.8 percent in 1998. In the first half of 1999, it grew by 7.3 percent, and the number reached nine percent by the end of the year. The unemployment rate, which hit a peak of 8.2 percent in February 1999, has since fallen back to 4.5 percent. As of June 1999, Korea paid back to the IMF a total of $4.8 billion, out of $14.2 billion, of IMF Supplemental Reserve Facility (SRF) loans. For the SRF loans that were due May and June 1999, the Korean government made an early repayment.[55] Since the initial phased-in financial assistance as of December 1997, the IMF as well as the World Bank expressed their satisfaction with the progress of restructuring reforms in Korea. Korea's economy seems to have bottomed out, and it hopes to become the first country to accomplish "V-shaped" recovery from the recent Asian crisis. Nonetheless, the restructuring process is slow and various significant uncertainties and risks are still facing the Korean economy. In addition, rapid legislative activities and implementing measures to comply with conditionality of the financial packages of the IMF and the World Bank are facing serious internal challenges. Let us take some examples demonstrating inherent limits of economic and legal reforms.[56]

First, the newly established FSC is now legally given full authority to play a supervisory role in financial reforms. The FSC has, to date, played a significant role in clearing the Korean financial markets and leading Korea's financial institutions to adopt the international standards and practices. Its role, however, seems to be, at most, instrumental to achieve the short-term goal. The FSC, under its authority, has ordered closing or restructuring of several banks and nonbank financial institutions. It appears to contribute to stabilizing the Korean financial market in the short run. Under a truly market-based economy, however, such decisions should be made by market forces, rather than by a powerful government agency. The government's role should be to set the objective market-based rules and enforce them. The FSC-enabling law does not seem to be designed to set out an objective legal apparatus under which market-based rules govern the financial system. Since its birth, the FSC has issued more than forty regulations and internal guidelines. Most of

54. Some macroeconomic data indicate the tremendous recovery made by Korea between 1997 and 1999. For example, the won-dollar exchange rate stabilized from 1,964 won-dollar on December 24, 1997, to around 1,200 won-dollar by November, 1999; foreign currency reserve increased from a mere $3.9 billion on December 18, 1997, to $68.4 billion by November, 1999; and foreign debt, which stood at $67.2 billion at the end of September 1997, turned into $400 million credit two years later, making Korea a creditor nation for the first time since 1979, when such statistics were first gathered by the Bank of Korea. *See* Korea Development Institute, KDI Kyong-Je-Joen-Mang (Economy Prospect) 1999 (visited Mar. 31, 2000) <http://www.kdi.re.kr/perio/fore-frame.htm>.

55. *See* Wang, *supra* note 35, at 16 n.2.

56. It is too early to predict the future of Korea's restructuring process. Furthermore, it would be more difficult to generally assess whether and to what extent the law has, and will have, contributed to the recovery of Korea's economy. This paper does not attempt to make such a general assessment. Rather, this section points out inherent limits of Korea's economic and legal reforms and suggests some possible options to perfect the ongoing economic and legal reforms.

such regulations contain many substantive provisions whose nature is merely discretionary and probably free from judicial review. This type of legislation could be effective to remedy the emergency situation of the Korean economy. But it seems to be unable to serve the long-term goal—establishing a sound financial system based upon market/rule-based legal system.

Corporate sector reforms are also being accompanied by new legislative activities. The Korean government again attempted to develop market-oriented principles to drive the corporate restructuring process. The law, to some extent, facilitates the market mechanism by enhancing transparency, accounting standards and disclosure rules for corporate entities. Nevertheless, the same problems as under financial reforms are arising in this corporate sector reform. The government agency, rather than the market, decides which firms must die and which firms must take medicine. The government designated certain firms as non-viable companies and forced them to exit promptly. Some other firms were designated by the government as viable but financially weak companies, and thus were forced to improve their financial structure through so-called "workout" programs.[57] In addition, the corporate law reform may face its enforcement problem. For instance, the new legislation lowered the threshold for minority shareholders' right to bring a derivative suit. To solve a collective action problem, for instance, it is often necessary for lawyers to take an initiative in bringing a derivative suit. Due to the lack of lawyers and other supplementary dispute settlement rules and procedures,[58] a very few well-qualified corporate lawyers in Korea have an incentive to represent minority shareholders rather than majority shareholders or incumbent corporate management. In addition, it is doubtful how responsive the already heavily burdened judges would be in dealing with this type of complex case requiring expertise in corporate and business matters. This example indicates that without fundamental reforms in the legal infrastructure, including the legal profession and dispute settlement system, economic reforms accompanied by a series of legislative actions would be poorly implemented.

The public sector reform would face a different problem. Once SOEs went private, competition law should take charge to regulate their market-restrictive behaviors in the previously public sector that was under state control. In this connection, Korea amended the MRFTA. This legislation was one of the conditions imposed under the SAL of the World Bank. Korea also enacted the Act on Comprehensive Regulation of Cartels. At the World Bank's request, the Korean government formed the Joint Public/Private Sector Committee in the spring of 1998. To meet the World Bank's deadline, the committee had to submit its recommendations for the amendment by July 1998. Due to such time pressure, the committee did not have enough time to discuss significant changes in substantive standards of the antitrust law. Nonetheless, the legislative bill based on the recommendations of the committee passed the legislature in December 1998. This unusual legislative process posed several problems. First, many important substantive standards and rules for the competition policy were adopted or changed without sufficient discussion and, therefore, might contain some flaws. In addition, the KFTC during this process endeavored to strengthen

57. The FSC took charge in this regard as well. Again, in the short run, this is understandable in light of the fact that the banks did not appropriately function at this time, and the majority shareholders of most banks are the government itself. Even so, this pattern of governmental intervention would not seem to serve the long-term goal—corporate restructuring on the basis of market-oriented principles and the rule-based legal system.

58. The lack of discovery procedures or a class action system are examples.

its discretionary enforcement power beyond the constitutional limit. It would be desirable for private rights of action to supplement, or sometimes check, the KFTC's enforcement of the antitrust law. The substantial amendment to the law, however, did not lift statutory restrictions on private rights of action under the MRFTA.[59] This example demonstrates that enactment of or amendment to certain laws to implement economic reforms could be distorted in the legislative process so as only to strengthen the enforcement power of the executive branch.

Labor law reform is facing a most significant social resistance. After the law legalized employee layoffs to facilitate the corporate restructuring process, labor unions have protested strongly against the management decisions to lay off workers. The labor group believed that even after the legal change, they could have a political impact on the Korean government and nullify the new legislation. They succeeded in some sense. The Korean government backed off, and the Ministry of Labor directed private companies to hold their employees as much as possible. The new labor law in many respects, therefore, is in legal limbo.

C. Lack of Reform in Legal Infrastructure

A brief review of Korea's economic reforms accompanied by legislative activities reveals a fundamental weakness of the whole scheme of the reform package. Although it pursued reforms in private sectors, the Korean government—composed of the executive, judicial, and legislative branches—did not make a fundamental legal reform in its own structure.

V. Judicial System

As shown above, the new massive legislation, as an instrument to implement the reform policy, could not fully function without an advanced legal infrastructure, such as the legal profession and dispute settlement system. No matter how good substantive rules and standards adopted by new legislation may be, their values would be undermined unless a legal system supporting their enforcement follows. In this respect, Korea is in need of judicial reform in its broad meaning. Nevertheless, the Korean government did not include this important item in the reform package after the financial crisis. An examination of relevant statistical data shows the Korean government's inaction in this respect.

Table 5 shows the recent increase in the number of lawsuits in Korea. In 1998, the number of civil lawsuits almost doubled the number in 1997. This is mainly due to massive business failures after the financial crisis and resulting legal disputes in Korea. Some of the new legislation also contributed to providing more avenues for dispute resolution between private parties. Nonetheless, the number of judges increased only marginally, from 1,494 to 1,564 in the same period, as shown in Table 6. No doubt, it resulted in a hyper-increase of the already excessive workload for individual judges. Table 7 shows the recent increase in the caseload for individual judges.

With this excessive workload for judges, no matter how independent the Korean judiciary may be, the Korean judicial system cannot work fairly to resolve important legal disputes

59. Under the MRFTA, a private party is not allowed to bring an antitrust action against another private party allegedly having violated the MRFTA, unless the KFTC has already found that a violation occurred and ordered the violator to adopt a corrective measure. *See* Monopoly Regulation and Fair Trade Act, art. 56.1 (1998) (Korea).

Table 5:
Number of Lawsuits (1995–1998)

Year	Criminal Lawsuits	Civil Lawsuits	Administrative Lawsuits
1995	2,190,119 (50.4%)	2,033,452 (50.4%)	11,874 (0.27%)
1996	2,046,840 (46.3%)	2,233,938 (50.5%)	15,074 (0.3%)
1997	2,579,259 (47.7%)	2,663,525 (49.3%)	48,922 (0.9%)
1998	2,670,613 (38.2%)	4,149,462 (59.4%)	16,568 (0.3%)

Source: OFFICE OF JUDICIAL ADMINISTRATION, HISTORY OF THE COURTS (1999).

Table 6:
Number of Judges

1996	1997	1999
1,434	1,494	1,564

Source: OFFICE OF JUDICIAL ADMINISTRATION, HISTORY OF THE COURTS (1999).

Table 7:
Caseload of Individual Judges

Year	Supreme Court	High Court	District Court	Average
1994	965.5 (13)	161.0 (166)	748.8 (885)	625.1 (1,064)
1995	921.9 (13)	151.3 (172)	808.9 (921)	627.4 (1,106)
1996	952.9 (13)	156.4 (174)	841.3 (985)	650.2 (1,172)
1997	980.4 (13)	165.7 (183)	879.6 (1,047)	625.2 (1,243)
1998	1,122.6 (13)	143.3 (180)	1,207.6 (1,038)	824.5 (1,231)

Source: OFFICE OF JUDICIAL ADMINISTRATION, HISTORY OF THE COURTS (1999).

accompanying the economic reform process. Since the economic crisis, no special courts that could deal with certain types of cases resulting from the financial crisis, have been established. The number of courts of general jurisdiction has increased marginally (see Table 8).

In terms of the number of lawyers, ironically, the Kim Dae-Jung government in 1998 suspended the previous plan (made in 1996 by the former government) to substantially increase the number of successful candidates for the Judicial Examination up to 1,000 per year and now annually produces only 700 new lawyers. Consequently, there has been only a marginal increase in the total number of lawyers for the last few years, as shown in Table 9.

Due to lack of sufficient lawyers having expertise in individual economic laws, the new, fancy legislation may not be fully utilized. For instance, as noted, the minority shareholders' rights can be effectively exercised only when well-qualified lawyers assist them. Also, except for the Ministry of Justice, there are only a handful of lawyers within the executive branch who serve as government officials. This is due to the lack of sufficient lawyers in Korea's society in general. In most cases, nonlawyer government officials are drafting important

Table 8:
Number of Courts

Year	Supreme Court	High Court	District Court	Divisions of the District Court
1994	1	5	12	44
1997	1	5	13	43
1998	1	6	15	43

Source: OFFICE OF JUDICIAL ADMINISTRATION, HISTORY OF THE COURTS (1999).

Table 9:
Number of Practicing Lawyers

1995	1996	1997	1998	1999
3,079	3,188	3,364	3,521	3,887

Source: OFFICE OF JUDICIAL ADMINISTRATION, HISTORY OF THE COURTS (1999).

legislative bills and, consequently, most regulatory laws tend to be discretionary by their nature and rarely subject to judicial review.

The foregoing review of relevant data strongly suggests that the ongoing economic reforms should be supplemented by comprehensive reform in the judicial system.

VI. Administrative System

The Korean banks' practice of granting excessive credit for projects with limited or uncertain returns had weakened the financial sector and was a main contributing factor to the outbreak of the financial crisis.[60] Such loans were called "policy loans" and in many cases, although indirectly through the banks, were driven by the Korean government's industrial policy. In other words, the government itself contributed to distorting Korea's financial markets by not allowing, or at least not directing, financial institutions to play according to the market-based rules and practices. The exercise of the government's authority as a financial sector supervisor should also be monitored and checked by some other mechanism. This is due to the danger of government failure. During the financial sector reform process, the Korean government strengthened its role as a supervisor. The creation of the FSC is the best example. It did not, however, check how past government failure contributed to the occurrence of the financial crisis. To correct government failure in this sector, Korea needs to set up the legal system under which even the government—the executive—is required to function according to the duly established and transparent rules —laws and regulations. As noted above, for example, the FSC-related laws and regulations provide the FSC with virtually unlimited discretionary power to exercise its own authority. Even if the FSC performs its role effectively in the short run, it would act in accordance with self-made guidelines rather than the rule of law. That practice, in the long run, would

60. *See* WANG, *supra* note 35, at 23.

possibly result in another government failure. In order to avoid this result, the financial reforms must be accompanied by legal reform that directs the executive branch to exercise its regulatory authority in accordance with the rule of law.

To be sure, the Korean government at the beginning announced its plan to downsize the executive branch and deregulate sectors that were previously under state control. The government did some of this, but it is not enough. To realize the goal of rule of law within the government would be more important than just shrinking the government's size. Deregulation means that private companies will run their businesses according to a market/rule-based system. In order to realize rule of law within the executive branch, there must be a comprehensive review of all economic laws and regulations that authorize the executive to exercise its discretionary power. Then, such laws and regulations as well as legal institutions should be transformed to the market-allocative and rule-based legal system. During the recent economic reform process, such a legal reform was realistically impossible and no one seriously attempted to launch this huge task. It is partly due to the fact that the executive branch took the initiative of the economic reforms and it had been accustomed to enjoying its discretionary power in the past. Only the executive participated in the negotiations with the IMF and the World Bank. Virtually all of the legislative bills to implement the economic reform package were drafted by the executive officials under time pressure.

In summary, a serious effort to realize rule of law within the executive branch should accompany the current economic reforms.

VII. Legislative System

The institutional strength of the legislative branch in enacting laws and regulations is very weak and this intensifies the weakness of the Korean legal system in general. For instance, out of 291 legislative bills that passed the National Assembly in 1998, the members of the National Assembly proposed only 104. The executive branch proposed the remaining 187 bills.[61] Even among the 104 bills, substantial portions were actually drafted by the executive and submitted to the National Assembly through the hands of the ruling party's core members. Realistically speaking, enhancement of the qualification of members of the National Assembly cannot be achieved through a sudden reform. Nonetheless, in order to restore the check and balance between the executive and the legislature, there should be some reform within the legislature to strengthen its capacity to enact laws and regulations, and in particular, those governing economic activities. This is also because the executive branch itself cannot be expected to submit the legislative bills to require the executive to function according to market/rule-based law and realize rule of law within its own branch.

VIII. Conclusion

This article closes with the following metaphor: In the early 1960s, there was a poor farmer family whose last name was *Korea*. The father of *Korea* family, whose name is *President*, implanted a small tree in the public garden, and named it *Korean Economy*. The name of the garden was *Market*. The *Koreas* wanted to grow the tree rapidly and outgrow other old trees in the neighborhood. So, all the members of *Korea* family diligently took care of

61. Data available from The National Assembly of Korea, Division of Legislative Bills.

that tree. They also wanted to harvest fruits from that tree as soon as possible. In the 1960s, the father of *Korea* family applied artificial fertilizers to the *Korean* tree. The names of the fertilizers were *Export-Oriented* and *Instrumental Law*. The tree grew quickly and outgrew some of the trees in the neighborhood by the 1970s. The shape of the *Korean* tree was not well balanced, however. Only some branches, whose names are *Heavy and Chemical Industry (HCI)* and *Chaebols*, flourished, whereas other branches, named *Light Industry*, *Small and Medium Sized Enterprises (SMEs)* and *Labor*, did not grow very well. At the warning of a gardener in the early 1980s that the *Korean* tree may fall down due to its imbalanced shape, the *Korea* family applied a medicine to rebalance the shape of the tree. The name of the medicine was *Instrumental Law II*. As the height of the Korean tree grew out of the reach of the *Korean* family by the mid-1980s, they realized that the *Korean* tree should grow by itself in the *Market* garden. Then, the *Korea* family gradually decreased the quantity of fertilizers and medicine for the *Korean* tree. Nevertheless, the sons of *Korea* family, whose names are *Bureaucrat* and *Discretion*, did not cease taking care of the tree, because they thought that they were better than sunlight and rain in growing the tree. By the mid-1990s, the height and size of the *Korean* tree outgrew most of the other trees owned by families living in a village, *Developing*. Nevertheless, the *Korean* tree was still smaller than several trees owned by a few families living in a hill area, *Developed*. In the summer of 1997, a rainstorm originating from a tropical jungle, *South-East Asia*, blew up the *Market* garden. The *Korean* tree was most badly hit and almost fell down. The neighbors were worried about the possibility that the *Korean* tree might fall upon other neighboring trees. The *Korea* family asked a gardener, *IMF*, to help rebuild the *Korean* tree. The gardener helped the *Korea* family on the condition that they agree to cut off significant portions of the tree's branches. A couple of years later, a botanist examined why the *Korean* tree was most severely damaged by the storm. He found that, in addition to the imbalanced shape of the tree, the weak roots were the major factor contributing to the near collapse of the *Korean* tree. The name of the root is *Legal System*. The botanist is now advising the *Korea* family to apply natural nutrient to the soil at the foot of the tree. The name of the natural nutrient is *Market/Rule-based*, and a more famous nickname is *Rule of Law*.